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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

No. 78- 78-5835

HERBERT G. WILKINS, SR.

Herbert G. Wilkins Sr., Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petition for Writ of Certiorari

Your Petitioner Prays that the Court will issue the Writ of Certiorari to review the Judgement of the United States Court of Appeals for the Third Circuit

ORDER BELOW.

The Order of the United States Court of Appeals for the Third Circuit is not yet reported, according to the belief and information of this Petitioner. A copy of the same is annexed hereto and designated as Appendix A.

Jurisdiction.

The Order of the Court below was entered on or about the ~~June~~ 9 day of June, 1977. The Petitioner will explain excusable neglect for the late filing below. The statutory jurisdiction of this Court is 28 USC 1254 (1).

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QUESTION PRESENTED.

WHAT REMEDY IS AVAILABLE FOR PETITIONER WHEN COURT APPOINTED ATTORNEY FAILED AND REFUSED TO FILE TIMELY PETITION FOR WRIT OF CERTIORARI IN DEFIANCE OF THE PETITIONER'S WRITTEN REQUEST THAT SAME BE DONE?

Statement of the Facts.

The Petitioner was convicted and sentenced in the United States District Court for the Third Circuit District of Pennsylvania, on or about 13 December, 1976. Timely appeal was taken by Court Appointed Counsel, Mr. Rudolph S. Pallastrone of the city of Philadelphia, State of Pennsylvania, This attorney had also been appointed for the trial in the District Court.

On or about June 9, 1977, the United States Court of Appeals for the Third Circuit entered a Judgment Order affirming the judgment and conviction of the District Court.

The Petitioner wrote a letter to his Court-appointed attorney, requesting him to take timely Petition for Writ of Certiorari to this Supreme court. The Petitioner and his friends and family were led to believe by court-appointed counsel, Mr. Rudolph S. Pallastrone, that he would file timely petition for writ of Certiorari.

The Petitioner, his family and friends waited for months and months, firm in their belief that the case was filed and pending in this Supreme Court.

Finally, on or about July 1 or 2 1978, the Petitioner wrote a letter to the Clerk of this Supreme Court to determine the status of his Petition for Writ of Certiorari. He was advised by the Clerk of this Court that no Petition for Writ of Certiorari had ever been received

in the office of the Clerk of this Supreme Court.

The Petitioner then and there wrote to said court-appointed attorney, demanding to know why the petition for writ of Certiorari had not been filed as originally agreed between them. The said Court-appointed attorney failed and refused to respond to such correspondence.

The Petitioner sua sponte obtained Affidavits from his family and friend who stated under oath that said court appointed attorney had led all of them to believe that he had filed, or would soon file, a timely and proper petition for writ of certiorari. Attached hereto will be found copies of said affidavit, including but not limited to the affidavit of this Petitioner.

The Petitioner fully recognizes that his application is untimely, but he also states that there is excusable neglect, caused by the failure and refusal of court appointed counsel, Mr. Rudolph S. Pallastrone, doing what he was required to do in the light of written request by this Petitioner who clearly advised the said attorney that he wanted his case taken before the United States Supreme Court.

The Petitioner asserts that it is his belief and information that under Rule 44, Fed. Rules of Crim. Procedure, and the Rules of Appellate Procedure and the Rules of this Supreme Court, in the light of ANDERS V. CALIFORNIA, 386 US 738 (1967), court-appointed counsel may not unilaterally withdraw. In this case there is nothing of record showing that counsel was released by either the Court or the Petitioner Under the circumstances, it appears that Petitioner should be permitted to file an out of time Petition for Writ of Certiorari, for the sake of justice and as a measure of Due Process. US Const. Amend. 5.

REASON RELIED UPON FOR ALLOWANCE OF THE WRIT.

That this Petitioner did not enjoy nor receive effective assistance of counsel as guaranteed by U.S. Const. Amend. 6, when court-appointed counsel failed and refused to file petition for writ of Certiorari in this Court and thereafter lied and misled Petitioner, his family and friends by falsifying in writing and orally that he had timely filed for the writ.

This Petitioner was represented at the trial and appellate levels by court appointed counsel. The Petitioner requested in writing and orally that said counsel take his case before the US Supreme Court following the ruling of the Court of Appeals for the Third Circuit.

Said court appointed counsel of record, failed and refused to file any petition for writ of certiorari in defiance of the Canons of Ethics, the Rules of this Supreme Court, the local rules in the Eastern District of Pennsylvania, and the rules of the US Court of Appeals for the Third Circuit.

Said counsel notified the Petitioner, his wife and friend, that said counsel had filed timely petition for writ of Certiorari in this Court following the ruling of the appellate Court. See Appendices B, C, D, E, Mrs. Mary F.C. Wilkins and Mr. William Warfield attached hereto.

Petitioner trusted said attorney and relied upon his word, only to find out months later that said attorney had lied and misled him, his wife and friend and that no petition for writ of certiorari had ever been filed in this Court in his behalf.

Your Petitioner relies upon the guarantee of the Sixth Amendment of the U.S. Constitution which assures him that he receive (effective) assistance of counsel...

It has been held that the accused is entitled to the assistance of counsel at every stage of the proceedings. Powell v. Alabama, a landmark decision from the 1930s.

The Criminal Justice Act, Rule 44, Federal Rules of Criminal Procedure, etc., all guarantee that the accused shall enjoy the effective assistance of counsel. Effective assistance of counsel does not mean pro form a representation.

Representation of counsel before this Court in a certiorari proceeding is the final step in the criminal justice system and for the attorney of record in this case to abandon his client and to then lie and mislead said client, the client's wife and friend, is tantamount to malpractice and might well be actionable in damages.

The sole issue before this court, however, is that such abandonment by court appointed counsel, who was an "officer of the Court" - accepting government funds - constuted a reversible error, requiring this Court to reverse and remand the cause of action so that the Petitioner may then take timely petition for writ of certiorari to this Court (with other appointed counsel).

In this fashion Justice will be vindicated and the Petitioner will have the opportunity to at least have this Court to peruse the issues involved and, even if the Court refuse Certiorari, the Petitioner can then seek a reduction of sentence in the trial court under the laws as made and provided.

SUMMARY.

The abandonment of clients at the Appellate level by Court-appointed counsel is something well known to this Court. Normally, the United States Solicitor, when faced (again) with this claim by federalprisoners, usually cites and relies upon In Re DOHERTY, and other related cases, holding that such conduct by court appointed counsel constitutes reversible error.

CONCLUSION.

The facts in this case defy contradiction. Therefore, it is respectfully requested that this Court grant the great writ, reverse and remand the cause to the Court below.

Respectfully submitted,

DATED: Dec 11 1978 Herbert G. Wilkins Sr.

HERBERT G. WILKINS, SR.
Petitioner pro se
Box 1000
Lewisburg, PA. 17837

STATE OF PENNSYLVANIA)
COUNTY OF UNION) SS.

I, the undersigned, Certify under penalty of perjury, that the contents of the foregoing petition named are true and correct.

EXECUTED ON THIS THE ~~Dec~~ 11 DAY OF December 1978.

Herbert G Wilkins Sr.
Petitioner, pro se
HERBERT G. WILKINS, SR.

Appendix (A)

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106

THOMAS F. QUINN
CLERK

TELEPHONE
215-597-2995

November 9, 1978

Mr. Herbert G. Wilkins, Sr.
#04908-158
U.S. Penitentiary
P.O. Box 1000
Lewisburg, PA 17837

Re: U.S.A. vs. Herbert Wilkins, et al.--Herbert Wilkins, Appellant
No. 76-2680

Dear Mr. Wilkins:

This will acknowledge recept of the following documents in the above-entitled case:

1. "Motion for Judgment Order and Motion for files and Records to be transmitted to the Clerk for the United States Supreme Court."
2. "Motion for files and records to be sent to the Clerk of the United States Supreme Court without prepayment of costs or the giving of security."
3. "Declaration"
4. "Notice of Motion"

Enclosed herewith is a copy of the Judgment-Order entered June 9, 1977.

Your request for the transmission of the "records" to the Supreme Court is premature at this time. Since you are proceeding in forma pauperis the Supreme Court does not require the lower court records until after the petition for writ of certiorari has been docketed and granted you may renew your request at that time.

Very truly yours,
T. F. Quinn-/bj
Clerk

bjr

cc: Gary Tilles, Esquire (w/o enclosure)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2680

UNITED STATES OF AMERICA

v.

HERBERT WILKINS and
LILTON SMITH

Herbert Wilkins, Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim No. 76-436)

Submitted Under Third Circuit Rule 12(6)
June 9, 1977
Before: ALDISERT, ROSENN and HUNTER, Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the court erred: (1) in denying the defendant's request for Loretta Dugger to testify at the probable cause hearing; (2) in questioning the witness Edward Smith, as it placed undue emphasis on his testimony already established through direct examination; (3) in denying the defense counsel in the closing argument the right to comment on the lack of evidence presented by the United States; and (4) in giving undue emphasis to the arguments of the United States in its charge to the jury; and, finally, that the Assistant United States Attorney committed prosecutorial misconduct in his closing argument where he presupposed that the defense had fabricated its argument and also proceeded to improperly rouse the prejudices of the jury; it is

Appendix (A)

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JUN 9 1977
THOMAS F. QUINN
Clerk

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

Aldisert
Circuit Judge

Attest:

Thomas F. Quinn, Clerk

DATED: JUN 9 1977

APPENDIX A

Appendix (B)

Herbert G. Wilkins Sr.
Sep 26 - 1977
Lewisburg Penitentiary 7:37
Need in love seeking peace

Dear Mr. Pallastrone

I am writting you in concern of my case myself and little wife would like very kindly to learn somewhat about the Appeal court outcome. As I've learn that my wife and friends talk with you of your next procedure in relation of my case. As you know that myself hve been requesting copyies of your brief but ask of yet I've never recieved nothing

As I said in Judge Ditter court room Dec, 13- 1976 that you never visit me or answer but one of my letter requesting a learn somewhat that was happen in my case. The last letter I recieved from you was fine day before getting sentence.

I've call from Oxford Wisconsin F.C.I trying to talk with you but your secretary wouldn't accepted my call, once entering Lewisburg Prison on transfer I had Mob United Counselor to call your office and the same responsdence. Bro. William Warfield and James Pierce also told me last week when I called that you was entering my case in the Supreme Courts. I've wrote you before requesting of you to follow up with my case to writ of Certiorari cause Warfield didn't know how to file in the court properly.

I am closing trusting God to work through you as we strive together in relation of my case, my schooling plus God Ministry are very great for now. So keep on doing God work in his wells please always Herbert G Wilkins Sr.

Appendix (B)

Appendix (C)

Affidavit

I Herbert G.Wilkins.confined in the United States Penitentiary Lewisburg,Penn.being duly sworn,deposes and Says:

The following statements are true and correct.IHerbert G. Wilkins alleged on and about,September 27,1977,I requested of my counsel Mr.Rudoph Pallastrone whether he had taken any other legal steps to affect the decision handed down by the court of Appeals for the 3rd Circuit on July 1,1977,My counsel Mr.Rudoph Pallastrone,says to me that he had already filed a writ for Certiorari.I then requested information by writing to the Supreme Court of the United States,Their responce was:

" I have Been unable to identify any case pending before this court in which you are involved,The Index does not show that any petition for writ of certiorari has been Submitted on your behalf.

Herbert G. Wilkins
Herbert G.Wilkins

Subscribed and sworn to pursuant to and in accordance with the provisions of Title 28 U.S.C.1746.

Appendix(C)

Appendix (D)

AFFIDAVIT

I Mrs. Mary F.C. Wilkins, after first being duly sworn upon her oath deposes and says:

I Mrs. Mary F.C. Wilkins, is a residence of 400 North Wanamaker Street, Philadelphia, Penna.
Say that I am 27 years old, and that I oarally spoke to Mr. Rudoph Pallastrone, about the decision that was handed down by the United States Court of Appeals for the 3ed, Circuit of Philadelphia, Pennsylvaina, concerning my husband Mr. Herdert G. Wilkins.

He told me that he had filed a writ for certiorari inthe United States Supreme Court on my husband Mr. Herbert G. Wilkins, behalf.

Iam Mrs. M.F.C. Wilkins, gave this affidavit for the truth of the matter and for no other reason.

Mary F.C. Wilkins
Mary F.C. Wilkins

I have signed this affidavit pursuant to and in accordance with the provision of title 28 U.S.C. 1746.

Appendix D

Appendix (E)

Affidavit

I William Warfield, aftre first being sworn upon his oath deposes and says:

I William Warfield, is a residence of the city of Philadelpha, Penna, and member of the Prison Ministry of Philadelpha, Pennsylvaina.

Say that I am 39 years old and that I oarally spoke to Mr. Rudoph Pallastrone, concerning the decision that was handed down by the United States Court of Appeals for the 3ed Circuit of Philadelpha, concerning Mr. Herbert G. Wilkins, Sr. on October of 1977.

He told me that he filed a writ for Certiorard in the United States Supreme Court on Mr. Herbert G. Wilkins Sr. behalf.

William Warfield
William Warfield

I have signed these papers entitled affidavit in pursuant to title 28 U.S.C. 1746.

No. 78-5885

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

HERBERT G. WILKINS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ORIGINAL COPY

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5885

HERBERT G. WILKINS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner, proceeding pro se, contends that his court-appointed attorney ignored his request to file a timely petition for certiorari.

In December 1976, after a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of kidnapping, interstate transportation of a female for immoral purposes, and conspiracy, in violation of 18 U.S.C. 371, 1201, and 2421.[1/] He was sentenced to 25 years' imprisonment on the kidnapping count, to be followed by two concurrent terms of five years' imprisonment on the other counts; the latter sentences were suspended in favor of five years' probation. The court of appeals affirmed in June 1977 by judgment order (Pet. App. A).

1/ Petitioner's co-defendant was tried separately, and convicted on similar charges. The court of appeals affirmed and this Court denied certiorari. Smith v. United States, 430 U.S. 948 (1977).

2. The deadline for filing a petition for certiorari in this Court was July 9, 1977. According to the affidavits filed with this petition (Pet. Apps. C, D, E), petitioner's counsel informed him in September 1977 that he had already filed a petition for a writ of certiorari; similar assurances were given to petitioner's wife and minister. In July 1978 petitioner wrote to the Clerk of this Court (Pet. 2), who informed petitioner that no petition for a writ of certiorari on his behalf had ever been submitted (Pet. App. C).

The petition was filed on December 14, 1978, seventeen months out of time. The pro se petition does not directly attack the validity of the judgment of the court of appeals but rather is addressed to the consequences of counsel's alleged failure to file a petition as requested. Petitioner alleges (Pet. 3) that nothing in the record shows that his counsel was released by the court of appeals, or by the petitioner. Since court appointed counsel may not withdraw unilaterally, Anders v. California, 386 U.S. 738 (1967), petitioner contends (Pet. 4) that he was justified in continuing to rely upon his counsel's earlier representations that a timely petition had been filed and that the case was proceeding properly.

The Criminal Justice Act of 1964, 18 U.S.C. 3006A(c), 3006A(d)(6), 3006A(g), provides for the assistance of counsel in preparing a petition for a writ of certiorari. Doherty v. United States, 404 U.S. 28 (1971); Schreiner v. United States, 404 U.S. 67 (1971). Since petitioner apparently has not

received such assistance,[2/] we recommend that this Court grant the petition for a writ of certiorari; vacate the judgment of the court of appeals; and remand the case to the court of appeals for further proceedings, including re-entry of its judgment affirming petitioner's conviction and, if appropriate, appointment of counsel for petitioner to assist him in seeking review in this Court. See Gordon v. United States, 429 U.S. 1085 (1977).

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

FEBRUARY 1979

2/ We have assumed for purposes of this response that the representations in petitioner's affidavits are true. We have tried several times to reach petitioner's appointed counsel, but he has not returned our calls. Since petitioner's entitlement to any form of relief, such as appointment of counsel for purposes of preparing a petition for certiorari, may well depend upon the truth of those allegations, which this Court is in no position to determine, we assume the matter will be inquired into as appropriate following remand.